UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TECHWORLD HOTEL ASSOCIATES, LLC D/B/A RENAISSANCE WASHINGTON, D.C. HOTEL, **Plaintiff and Counterclaim Defendant,** **v.** **NCS PEARSON, INC.,** **Defendant and Counterclaim Plaintiff.**	)	**Case No. 02-CV-02055 (RMC)**

MEMORANDUM OPINION

Pending before the Court is Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment. At issue in this case is whether a liquidated damages clause for cancellation of a group hotel reservation is enforceable under the law of the District of Columbia. Upon consideration of the entire record before the Court and the applicable law, the Court finds that the liquidated damages clause is valid and enforceable. Plaintiff's motion for summary judgment will be granted, and Defendant's cross motion for summary judgment will be denied.

Background

Plaintiff Techworld Hotel Associates, LLC, d/b/a Renaissance Washington DC Hotel ("Renaissance Hotel" or "the Hotel") operates a hotel located in the District of Columbia. (Compl. ¶ 1.) Defendant NCS Pearson, Inc. ("NCS Pearson") is a Minnesota corporation. On or about June 11, 2002, Renaissance Hotel and NCS Pearson signed a Group Sales Agreement ("the Agreement") in which Renaissance Hotel agreed to provide, and NCS Pearson agreed to pay for, 5045 hotel room nights from June 20, 2002, through August 3, 2002. (Compl. ¶ 6.)[1]

Renaissance Hotel and NCS Pearson explicitly agreed that "if a cancellation occurs. . . [i]t would be difficult to determine Hotel's actual harm." (Pl.'s Mot. for Summ. J., Ex. 1-B at 8. ("Ex. 1-B")) The Agreement therefore included a comprehensive liquidated damages clause that accounts for various forms of breaches. (*Id.* at 9.) The provision of the liquidated damages clause relevant to the instant dispute stated:

> From the date of signature to one day prior to arrival June 19, 2002 and resulting in the cancellation of the remaining guestrooms, NCS Pearson agrees to pay $718,950 (total number of guestrooms, 5992, at 80% slippage, 4793 multiplied by the average group rate of $150.00 equals 718,950), as liquidated damages and not as a penalty.[2]

(*Id.* at 9 ¶ 1.) In addition, the Agreement provided that the prevailing party in any litigation relating to the contract would be entitled to costs and reasonable attorneys' fees. (*Id.* ¶ 7.)

On June 18, 2002, NCS Pearson notified Renaissance Hotel of its intent to cancel its room reservations. (Pl.'s Mot. for Summ. J. ¶ 2.) Renaissance Hotel deemed this cancellation a breach of the Agreement and therefore demanded a liquidated damages payment of $718,950. (Pl.'s Mot. for Summ. J. ¶ 5.) NCS Pearson has refused to pay the liquidated damages and this litigation ensued. Both parties have filed motions for summary judgment.

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[1] The Hotel initially contended that NCS Pearson contracted for 5992 room nights. In its Opposition to the Cross Motion for Summary Judgment, the Hotel concedes that the Agreement was amended and the total room nights for which NCS Pearson was contractually obligated to pay is 5045 (5147 room nights less a contractual credit of 102 room nights). (Opp'n to Def.'s Cross Motion for Summ. J. at 11.)

[2] The original, typewritten liquidated damages amount in the Agreement was $766,880. That number was crossed out and replaced by the handwritten number $718,950. (Pl.'s Mot. for Summ. J., Ex. 1-A at 9 ¶ 1. ("Ex. 1-A"))

Analysis

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48. Only disputes over facts that might affect the outcome of the suit under the governing law are material. *Id.* at 248.

NCS Pearson asserts that its cancellation of the contract fell within the ambit of the Impossibility Clause because the Transportation Security Administration ("TSA"), for which NCS Pearson had made the arrangements, decided not to go forward with the planned event for security reasons. The Impossibility Clause stated

> [t]he performance of this Agreement is subject to termination without liability upon the occurrence of any circumstances beyond the control of either party – such as acts of God, war, government regulations, disaster, strikes. . . civil disorder, or curtailment of transportation facilities – to the extent that such circumstance makes it illegal or impossible to provide or use the Hotel facilities. The ability to terminate this Agreement without liability pursuant to this paragraph is conditioned upon delivery of written notice to the other party setting forth the basis for such termination as soon as reasonably practical – but in no event longer than ten (10) days – after learning of such basis.

(Ex. 1-A at 10.) The decision of a client to cancel an event does not fall within the Impossibility Clause. To excuse NCS Pearson from its contractual obligations because its client decided to cancel would reduce the meaning of the Impossibility Clause to apply to any client cancellation. Notably, NCS Pearson makes no effort to tie TSA's decision to any of the specific terms of the Impossibility Clause, nor can they. This conclusion is bolstered by the fact that NCS Pearson did not act at the time as if it believed the circumstances were within the Impossibility Clause. It did not provide the requisite written notice until July 17, 2002, well beyond the ten days required by the Agreement.

More substantively, NCS Pearson contends that it is not liable for liquidated damages because the clause at issue amounts to a penalty and is unenforceable.[3] It is well settled in the District of Columbia that parties to a contract may agree in advance to a fixed sum that will be forfeited as liquidated damages in the event of breach. *Red Sage Ltd. P'ship v. Despa Deutshce Sparkassen Immobilien-Anlage-Gaselllschaft MBH*, 254 F.3d 1120, 1126-27 (D.C. Cir. 2001) (quoting *Davy v. Crawford*, 147 F.2d 574, 575 (D.C. Cir. 1945)). Liquidated damages are appropriate in situations where actual damages would be difficult to ascertain. *Davy*, 147 F.2d at 575. A court may deem a liquidated damages clause invalid as a penalty on the grounds of public policy if it is "plainly without reasonable relation to any probable damage which may follow a breach." *Id.*; *see also Ashcraft & Gerel v. Coady*, 244 F.3d 948, 954 (D.D.C. 2001) ("[S]o long as the amount agreed to by the parties prior to the breach is reasonable, the court will uphold the provision."). "In order to determine whether or not the provision should be construed as a penalty the contract must be construed as a whole as of the date of its execution." *Davy*, 147 F.2d at 574.

When they drafted the Agreement, the parties explicitly agreed that it would be difficult to determine Renaissance Hotel's actual harm if NCS Pearson were to breach the contract. (Ex. 1-B at 8.) Aside from the text of the signed Agreement, the difficulty of calculating actual damages is

[3] NCS Pearson asserts that its representative, Debra Herbst, lacked actual authority to enter into the Agreement. In its Statement of Genuine Issues in its Opposition to Plaintiff's Motion for Summary Judgment, however, NCS Pearson concedes that "On June 13, 2002, the Parties signed a Group Sales Agreement." (Def.'s Opp. to Pl.'s Mot. for Summ. J. at 2.) Therefore, there is not a genuine issue of dispute on this point.

evidenced by the vastly different equations and factors the parties advocated in their briefs.[4] (Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 2-3; Opp'n to Def.'s Cross-Motion for Summ. J. and Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 9-16.) The parties' various calculations illustrate why upholding the liquidated damages clause in this case is consistent with one of the primary purposes of such a clause: simplification of the resolution of a dispute in the event of a breach. *See Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 367 (D.C. 1984).

NCS Pearson contends that the liquidated damages clause is a penalty because it results in the Hotel receiving more money from NCS Pearson than it would have had the contract been fully performed. This argument ignores the Hotel's damages in the form of costs for preparing certain rooms for the conference and for relocating a client who had previously booked at Renaissance to another hotel. The argument also ignores the loss of revenue the Hotel reasonably anticipated to receive from other sources. *See Aschcraft & Gerel*, 244 F.3d at 955 (considering lost business opportunities and other incurred costs in evaluating the reasonableness of a liquidated damages provisions). Renaissance Hotel gave NCS Pearson greatly reduced room rates as well as several other price concessions on various hotel services. (*E.g.*, Ex. 1-A at 2-3, 7 (rack rate for rooms is $269/single, $299/double, while discounted contract price was $150/single, $170/double; NCS Pearson given complimentary parking passes, coffee and soda; Renaissance waived function space

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[4] The parties disagree over the rate at which the rooms would have been billed had NCS Pearson fully performed. NCS Pearson uses a rate of $150 per room night, the contractual single occupant rate. Renaissance Hotel correctly points out, however, that at the time of contracting it appeared that at least some of the rooms would be billed at the double rate of $170 per night, given that the anticipated attendance was 200 people. (Compl. Ex. 1 at 1.) This disagreement, rather than being a factual dispute that precludes the entry of summary judgment, further supports the proposition that at the time the parties executed the contract actual damages would have been difficult to calculate.

fees.)) The Hotel reasonably anticipated to generate revenue from the sale of other food, drinks and other services to hotel guests brought to Washington, D.C. by TSA. (Affidavit of Brad Edwards, General Manager of Techworld, ¶ 12, Ex. A, Pl.'s Opp. to Def.'s Motion for Summ. J.)[5] This anticipated revenue, whether it came from NCS Pearson guests or guests the Hotel could have otherwise accommodated, amounts to a lost business opportunity and points both to the difficulty in forecasting actual damages and the reasonableness of the liquidated damages provision. It is entirely reasonable for Renaissance Hotel to include other revenue sources, as well as consequential damages, in calculating its expected loss resulting from a breach of the Agreement.

Further evidence of the reasonableness of this liquidated damages clause lies in its variable calculation of damages based on the number of days cancelled and how far in advance a cancellation occurred. (Ex. 1-B at 8-9.) A liquidated damages provision that requires forfeiture of an invariable fixed sum regardless of the nature of the breach may be a penalty. *Red Sage*, 254 F.3d at 1129 (citing *Davy*, 147 F.2d at 575). Here, variation in damages based on the total number of rooms cancelled, and when, demonstrates that these liquidated damages are reasonably related to the actual damages caused by the specific breach at issue. *See id.*

Finally, both Renaissance Hotel and NCS Pearson are sophisticated parties who negotiated the terms of the contract at arm's length and made handwritten changes to the final Agreement.[6] (Ex.

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[5] Renaissance Hotel has submitted affidavit evidence that it anticipated additional revenues of $60.50 per day per room from guests. (Affidavit of Brad Edwards, General Manager of Techworld, ¶ 12, Ex. A, Pl.'s Opp. to Def.'s Motion for Summ. J.)

[6] NCS Pearson heavily relies on the fact that the parties amended the contract to reduce the number of room nights but did not reduce the liquidated damages amount. While this is a factor that bears on the reasonableness of the liquidated damages provision, the Court finds that in light of the other damages that could be reasonably anticipated at the time of execution and the

1-A at 9). District of Columbia courts are "generally reluctant to disturb terms agreed upon by" sophisticated businesses, and this Court finds no exceptional circumstances in the present case that would render such a view unjust. *Id.* at 1129; *see also, e.g.*, *District of Columbia v. C.J. Langenfelder & Son, Inc.*, 558 A.2d 1155, 1163 (D.C. 1989).

The United States Court of Appeals for the District of Columbia articulated this Circuit's views on liquidated damages:

> All liquidated damages clauses, if implemented in situations where damages are difficult to estimate, will generally end up either over- or under-estimating actual damages . . . We do not know exactly why the parties agreed to this particular clause, nor is it our role to discern their precise intentions. Because the provision is neither obviously one-sided nor obviously intended to impose a penalty that would coerce performance, because the actual estimate is not clearly unreasonable in relation to the range of possible damages, and because both parties are sophisticated businesses, we find that . . . [the] liquidated damages clause . . . is enforceable as a matter of law.

Red Sage, 254 F.3d at 1130. This reasoning is directly applicable to the case at hand. Accordingly, this Court holds that the liquidated damages provision in the Agreement is enforceable as a matter of law.

Conclusion

Because no factual disputes exist that might affect the outcome of the suit and because liquidated damages of $718,950 are reasonable in this case, and therefore enforceable, Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Cross Motion for Summary Judgment is **DENIED**. Pursuant to the Agreement, NCS Pearson shall pay reasonable attorneys'

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contract as a whole, the provision is still reasonable.

fees and costs to the Hotel. Counsel are directed to submit their statement of fees and costs within 14 days. A separate Order will accompany this Memorandum Opinion.

/s/

ROSEMARY M. COLLYER
United States District Judge

Date: July 9, 2003